IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERIC STOVER,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 04-CV-06079
	:	
v.	:	
	:	
JACK ECKENRODE, et al.,	:	
	:	
Defendants.	:	

Stengel, J. December 13, 2005

MEMORANDUM AND ORDER

Defendants Jack Eckenrode and Jeffrey Lampinsky filed a motion to dismiss plaintiff Eric Stover's complaint. Mr. Stover alleges that agents of the Federal Bureau of Investigation (the "FBI"), and specifically these two defendants, have violated his constitutional rights. For the reasons described below, I will grant the motion to dismiss. I also find that the case warrants dismissal due to Plaintiff's failure to prosecute in light of Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984).

I. BACKGROUND

Plaintiff filed this lawsuit against defendants Jack Eckenrode, the Special Agent-in-Charge of the FBI's Philadelphia Division, Jeffrey Lampinsky, the former Special Agent-in-Charge of the FBI's Philadelphia Division, and unnamed agents in the FBI's Philadelphia Division (collectively "Defendants"). Plaintiff's Complaint alleges a

panoply of events, conversations, mental impressions, and descriptions which Plaintiff claims have violated his constitutional rights. The Complaint alleges, *inter alia* (1) that Plaintiff had discussions with a person named Keith Stevens relating to the indictment of a number of individuals for their alleged participation in a drug conspiracy, (2) facts related to the clerical errors and thought processes surrounding Plaintiff's application for a "wool and quilted scarf" patent, (3) that the FBI moved an envelope containing "toll bridge money as well as two C.O.D. checks" from the top of a safe in Plaintiff's bedroom to a space underneath the safe, (4) that "someone" at the FBI's Philadelphia Division influenced a United States District Court Judge's legal opinion concerning the Patriot Act, and (5) that FBI agents entered Plaintiff's room at night and (a) put "drugs or chemicals into his personal hygiene items . . . and daily necessities . . . that have impaired plaintiff's jugular veins, in his neck, and the two carotid veins attached to plaintiff's brain," and (b) exposed Plaintiff to germs which gave him "a winter cold in his respiratory system."

Plaintiff alleges that as a result of the facts described above, Defendants violated his rights under the United States Constitution. Plaintiff seeks compensatory and punitive damages as well as declaratory and injunctive relief.

On January 3, 2005, Plaintiff initiated this lawsuit by filing the Complaint against Defendants, and the Court granted Plaintiff's motion to proceed *in forma pauperis* (Docket No. 2) on the same day. On February 11, 2005, Plaintiff moved to amend his Complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure. The Court

delayed any action in the case until the government filed its Conditional Entry of Appearance on April 6, 2005 (Docket No. 10). Thereafter, the Court granted Plaintiff's motion to amend in an Order entered on May 31, 2005 (Docket No. 11), giving him 15 days from the date of the Order to amend his Complaint.[1] Plaintiff did not amend his Complaint, however, and instead appealed the Court's Order to amend to the Third Circuit Court of Appeals on June 6, 2005. The Third Circuit declined to consider Plaintiff's appeal on the basis that it did not have appellate jurisdiction because this Court had not yet entered a final judgment.

On August 31, 2005, the Court ordered that the case be removed from suspense and returned to the active docket (Docket No. 21). In the same Order, the Court again ordered Plaintiff to file an amended Complaint within 15 days, stating that "[f]ailure to comply . . . could result in dismissal of the case for lack of prosecution." Again, Plaintiff did not amend his Complaint within the time specified.

Defendants filed their Motion to Dismiss (Docket No. 20) on August 30, 2005, arguing that the Complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff has not filed a response or brief in opposition to Defendants' motion. On October 19, 2005, the Court ordered the parties to attend a status conference on November 17, 2005 (Docket No. 22) to inquire into

[1]Within the same Order, the Court denied Plaintiff's request that the Court order Defendants to provide the names and addresses of certain agents within the FBI.

Plaintiff's intentions with respect to the lawsuit and to determine whether to dismiss the suit for failure to prosecute. Plaintiff failed to attend the status conference despite notice from the Court.

II. LEGAL STANDARDS

A. Standard for a Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted examines the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A federal court may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley, 355 U.S. at 45-46). In determining whether to grant a motion to dismiss, a federal court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Carino, 376 F.3d at 159. See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984).

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. Id. A plaintiff, however, must plead specific factual allegations. Neither "bald assertions" nor "vague and

conclusory allegations" are accepted as true. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995). Accordingly, "a court should not grant a motion to dismiss 'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Conley, 355 U.S. at 45-46; Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997). Furthermore, a "pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (internal quotations omitted)).

B. Standard to Sua Sponte Dismiss a Complaint for Failure to Prosecute

Under the Federal Rules of Civil Procedure, a district court may dismiss a plaintiff's case for failure to prosecute. See FED. R. CIV. P. 41(b); Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) (allowing *sua sponte* dismissal of cases pursuant to Rule 41(b) of the Federal Rules of Civil Procedure). Before dismissing a case under Rule 41(b), however, courts in the Third Circuit must consider and analyze six factors relevant to determining whether to dismiss a case for failure to prosecute. Poulis, 747 F.2d at 868.

The factors given by the Third Circuit are:

> (1) the extent of the party's personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense.

Poulis, 747 F.2d at 868 (emphasis in original). The Third Circuit has noted that the Poulis analysis is not a "mechanical calculation" to determine whether to dismiss a case, and that "not all of the Poulis factors need be satisfied in order to dismiss a complaint." Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). Instead, the Poulis analysis is a balancing test and no single factor is determinative. See United States v. 68.94 Acres of Land, 918 F.2d 389, 397 (3d Cir. 1990).

III. DISCUSSION

The Complaint states that Defendants have violated Plaintiff's constitutional rights, but it does not specifically identify the legal theory under which Plaintiff plans to proceed at trial. Courts must construe a *pro se* plaintiff's complaint liberally and apply the applicable law whether or not the *pro se* plaintiff has mentioned it by name. See Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003). Thus, because Plaintiff is proceeding *pro*

se, the Court will construe the Complaint to allege a civil rights action under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In Bivens, the Supreme Court established a direct cause of action against federal officials who violate a citizen's constitutional rights.[2]

A. Defendants' Motion to Dismiss

The doctrine of sovereign immunity generally precludes suits against the United States unless it has consented to be sued. United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992). In particular, sovereign immunity precludes a plaintiff from bringing a Bivens action against a federal agency. See FDIC v. Meyer, 510 U.S. 471, 484-86 (1994). The Supreme Court has held that suits brought against federal officials in their official capacities are to be treated as suits against the employing government entity. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (cited with approval in Christy v. Pa. Turnpike Comm'n, 54 F.3d 1140, 1143 n.3 (3d Cir. 1995)). As a result, a Bivens suit brought against an individual federal official acting in his official capacity is barred by the doctrine of sovereign immunity. See also Chinchello v. Fenton, 805 F.2d 126, 130 n.4 (3d Cir. 1986) (affirming district court's conclusion that sovereign immunity barred an official-capacity Bivens claim).

[2]An action brought under the authority of Bivens is the federal equivalent to a suit brought against state actors under 42 U.S.C. § 1983. See Brown v. Philip Morris, Inc., 250 F.3d 789, 800 (3d Cir. 2001).

In this case, each of the Defendants is a current or former agent of the FBI. While the Complaint is unclear as to exactly how Defendants' actions have harmed Plaintiff, it clearly asserts that Defendants acted in their official capacities. Consequently, Defendants are federal officials and Plaintiff's Bivens claim against Defendants in their official capacities is barred by the doctrine of sovereign immunity. The Court therefore lacks jurisdiction to hear this claim. See Kabakjian v. United States, 267 F.3d 208, 211 (3d Cir. 2001) (holding that district courts lack jurisdiction to hear claims brought against the United States unless Congress has explicitly waived sovereign immunity).

Furthermore, even after liberally construing Plaintiff's *pro se* Complaint, there are no factual allegations in the Complaint supporting a Bivens claim against Defendants in their individual capacities. The Complaint does not allege any facts either stating or inferring that Defendants acted in anything but their official capacities as FBI agents. Accordingly, the Complaint fails to state a claim upon which relief can be granted against Defendants in their individual capacities.

B. Dismissal for Failure to Prosecute

Plaintiff has failed to prosecute his case. He has ignored orders of this Court granting him leave to amend his Complaint, and he has failed to attend a status conference scheduled to afford him the opportunity to discuss the case with the Court and opposing counsel. In light of the Poulis factors set forth above, I find that Plaintiff's failure to prosecute mandates the dismissal of this case.

1. The Extent of Plaintiff's Personal Responsibility

The first factor a court must consider under Poulis is the Plaintiff's personal responsibility for failing to pursue his claims. Poulis, 747 F.2d at 868. *Pro se* litigants have a "personal responsibility for the conduct of the litigation" because they represent themselves. Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 920 (3d Cir. 1992).

In this case, Plaintiff is proceeding *pro se* and therefore bears sole responsibility for his failure to comply with the Court's Orders to amend the Complaint, to oppose Defendants' Motion to Dismiss, and to attend the November 17, 2005 status conference. The Court also warned Plaintiff in the August 31, 2005 Order that failure to amend could result in the dismissal of the case for failure to prosecute. See, e.g., Valentine v. Museum of Modern Art, 29 F.3d 47, 50 (2d Cir. 1994) (holding that the sanction of dismissal should not be imposed against a *pro se* litigant unless "a warning has been given that noncompliance can result in dismissal"). The October 19, 2005 Order scheduling the status conference for November 17, 2005 stated: "The purpose of the conference is to inquire into the plaintiff's intentions with respect to this lawsuit and whether the lawsuit should be dismissed for plaintiff's failure to prosecute." Plaintiff alone bears responsibility for his failure to obey the Court's orders, and the first Poulis factor weighs in favor of dismissing the Complaint.

2. Prejudice to Defendants

The second Poulis factor is the resulting prejudice to a party's adversary caused by the party's failure to prosecute. Poulis, 747 F.2d at 868. Prejudice occurs when a party's actions impose a burden on his adversary that impedes the adversary's ability to prepare for trial. Ware v. Rodale Press, Inc., 322 F.3d 218, 223 (3d Cir. 2003).

Plaintiff's actions in this case have prejudiced Defendants in two ways. First, Plaintiff's failure to appear at the status conference has prejudiced Defendants by forcing them to assume additional and unnecessary legal costs. Second, Plaintiff's failure to follow the Court's orders has delayed the progress of this lawsuit. See, e.g., Adams v. Trs. of the N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994) (holding that unnecessary delay in litigating a case makes it more difficult for defendants to conduct factual discovery because it can lead to "the irretrievable loss of evidence" and the "inevitable dimming of witnesses' memories"). I find that the second Poulis factor weighs in favor of dismissing Plaintiff's case.

3. History of Plaintiff's Dilatoriness

The third factor listed by the Third Circuit in Poulis is whether the party has demonstrated a history of dilatoriness in the litigation. Poulis, 747 F.2d at 868. The Third Circuit has found that "[e]xtensive or repeated delay or delinquency constitutes a history of dilatoriness . . . ." Adams, 29 F.3d at 874.

In this case, Plaintiff has displayed a history of dilatoriness by failing to amend the Complaint despite two separate orders to do so. Plaintiff's dilatoriness is further evinced by his failure to oppose Defendants' Motion to Dismiss and to attend the November 17, 2005 status conference. Accordingly, the third Poulis factor favors dismissing the case.

4. Willfulness or Bad Faith of Plaintiff's Conduct

The fourth Poulis factor requires the Court to consider "whether the conduct of the party . . . was willful or in bad faith." Poulis, 747 F.2d at 868. A party's behavior is willful when it "involves intentional or self-serving behavior." Adams, 29 F.3d at 32. When evaluating whether to dismiss a case with prejudice, courts look for the "type of willful or contumacious behavior that can be characterized as acting in 'flagrant bad faith.'" Smith v. Altegra Credit Co., Civ. A. No. 02-8221, 2004 WL 2399773, at *6 (E.D. Pa. Sept. 22, 2004) (quoting Adams, 29 F.3d at 32). Consistent failure to comply with a court's orders despite warnings about the consequences of noncompliance is sufficient evidence of "flagrant bad faith" to warrant dismissal. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 640-41, 643 (1976) (per curiam).

Plaintiff's conduct in this lawsuit appears to be willful for a number of reasons. First, Plaintiff failed to respond to two orders explicitly requiring him to amend his Complaint. In particular, Plaintiff failed to obey the August 31, 2005 Order which specifically advised Plaintiff that failing to amend his Complaint could result in the dismissal of his case. Second, Plaintiff appealed the Court's Order allowing him to

amend his Complaint to the Third Circuit. This was an appeal with no legal merit. Essentially, Plaintiff appealed an interlocutory order entered in his favor. Plaintiff's appeal caused only additional delay and expense and was certainly not made in good faith. Finally, Plaintiff's failure to attend the November 17, 2005 status conference, held to determine whether to dismiss the suit for failure to prosecute, lends even more support to the conclusion that Plaintiff has consistently failed to comply with the Court's Orders. Accordingly, I find that Plaintiff's conduct was willful and that the fourth Poulis factor weighs in favor of dismissing the Complaint.

5. Effectiveness of Alternative Sanctions

The fifth factor the Court must consider before dismissing a case for failure to prosecute is the feasibility and effectiveness of alternative sanctions. Poulis, 747 F.2d at 868. It does not appear that the use of other sanctions would be an effective means to encourage Plaintiff's compliance with the Court's Orders in this case. Assessing costs or other monetary sanctions against Plaintiff would be ineffective as Plaintiff is proceeding *in forma pauperis*. Furthermore, the Court notes that Plaintiff has had two opportunities to amend his Complaint in the face of Defendants' Motion to Dismiss but has failed to do so. Thus, admitting certain evidence against Plaintiff at trial would not be an effective sanction because it is unclear from the Complaint what evidence Plaintiff might seek to introduce. Accordingly, I find that this Poulis factor weighs in favor of dismissing the Complaint.

6. Meritoriousness of Plaintiff's Claims

Poulis requires the Court to analyze the meritoriousness of the Complaint. Poulis, 747 F.2d at 868. The standard a court uses under this factor is the same as the analysis it would use when considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Huertas v. City of Philadelphia, Civ. A. No. 02-7955, 2005 WL 226149, at *5 (E.D. Pa. Jan. 26, 2005). After reviewing Defendants' uncontested Motion to Dismiss[3] and the supporting memorandum of law, it is clear that the Court lacks jurisdiction and that the Complaint fails to state a claim upon which relief can be granted. This lack of legal merit meets the final Poulis factor and weighs in favor of dismissing the Complaint due to Plaintiff's failure to prosecute.

IV. CONCLUSION

For the reasons described above, I will grant Defendants' Motion to Dismiss. Furthermore, after a careful review of each of the Poulis factors, I find that the case also warrants dismissal due to Plaintiff's failure to prosecute. An appropriate Order follows.

[3]Plaintiff has failed to oppose Defendants' Motion to Dismiss. Pursuant to the Local Rules of Civil Procedure, the Court may therefore grant Defendants' motion as uncontested. E.D. PA. R. CIV. P. 7.1(c) ("In the absence of a timely response [to a motion], the [unopposed] motion may be granted as uncontested"). Accordingly, the Court will consider Defendants' motion to be uncontested.

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v.	:	
	:	
JACK ECKENRODE, et al.,	:	
	:	
Defendants.	:	

AND NOW, this day of December, upon consideration of Defendants' Motion to Dismiss (Docket No. 20), it is hereby **ORDERED** that the motion is **GRANTED** and the Clerk of Court is directed to close this case.

BY THE COURT:

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LAWRENCE F. STENGEL, J.